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IN THE

Supreme Court of the United States

October Term, 1963

No. 362

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation, et al.,
Petitioners,

v.

WEBB'S CITY, INC., a Corporation.

On Writ of Certiorari to the District Court of Appeal of Florida, Second District

BRIEF FOR PETITIONERS

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Summary of Argument	7
ARGUMENT:	
I. Picketing which is lawful in manner and purpose is protected by the First and Fourteenth Amendments of the United States Constitution	9
II. The decision below is in conflict with the holdings of this Court, since it seeks to restrain public protests against racial discrimination because of a state policy of segregation	14
III. Respondent's suggestion of mootness has no basis in law or fact	17
Conclusion	20

Table of Cases

A. S. Beck Shoe Corp. v. Johnson, 274 N. Y. S. 946 (1934)	11
Bakery Drivers v. Wohl, 315 U. S. 769	10
Bates v. Little Rock, 361 U. S. 516	7, 13
Brown v. Board of Education, 347 U. S. 483	8, 16
Building Service Employees v. Gazzam, 339 U. S. 532	11
Cafeteria Employees Union v. Angelos, 320 U. S. 293	11
Carlson v. California, 310 U. S. 106	9
Carpenters and Joiners Union v. Ritters Cafe, 315 U. S. 722	7, 10

PAGE

Consumers Union of United States, Inc. v. Admiral Corp., 186 F. Supp. 800 (S.D.N.Y. 1960) 19

Consumers Union of United States, Inc. v. Lectra Sales Corp., et al., 179 F. Supp. 161 (S.D.N.Y. 1959) 19

Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 ..... 7, 10

Ex Parte Lyons, 81 P. 2d 190 (1938) 9

Ex Parte Virginia, 100 U. S. 339 16

Florence, et al. v. Lewis O. Myers, Jr., et al.,—F. Supp—, [U. S. District Court for the Middle Dist. of Florida, Ocala Div. No. 64–3–Civil–Ocala, Jan. 22, 1964] 16

Gayle v. Browder, 352 U. S. 903 ..... 8, 16

Giboney v. Empire Storage Co., 366 U. S. 490 ....7, 10, 11

Goss v. Board of Education, 373 U. S. 683 ..... 8, 16

Gray v. Sanders, 372 U. S. 368 19

Green v. Samuelson, 168 Md. 421 (1935) 11

Hague v. CIO, 307 U. S. 496 12

Hughes v. Superior Court, 339 U. S. 460 ..... 7, 11

Hughes v. Superior Court, 198 P. 2d 885 (1948)... 11

In re Barnett, 124 F. 2d 1005 (2d Cir. 1942) 20

International Brotherhood of Electrical Workers v. National Labor Relations Board, 341 U. S. 694.. 10

International Brotherhood of Teamsters v. Hanke, 339 U. S. 470 10

International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U. S. 284 .....7, 10, 11

John T. Lloyd Laboratories, Inc. v. Lloyd Bros. Pharmacy, Inc., 131 F. 2d 703 (6th Cir. 1942) 19

Juvenile Shoe Co. Inc. v. Federal Trade Commission, 289 Fed. 57 (9th Cir. 1923) 19

Kennedy v. Retail Clerks Union, Local 324, 194 F. Supp. 131 (S. D. Cal. 1961) 12

PAGE

Local Union #10, Plumbers & Steamfitters v. Graham, 345 U. S. 193 ..... 10, 11
Lombard v. Louisiana, 373 U. S. 267 16

McLaurin v. Oklahoma State Regents, 339 U. S. 637 8, 16

NAACP v. Alabama, 357 U. S. 449 .....7, 9, 13. 16
NAACP v. Button, 371 U. S. 415 .....7, 9, 11, 13, 14

Peterson, et al v. City of Greenville, 373 U. S. 244 16

Rosman v. United Strictly Kosher Butchers, 298 N. Y. S. 343 (1937) 9

Saxlehner v. Eisner, et al., 147 Fed. 189 (2d Cir. 1906) 19
Schneider v. State, 308 U. S. 147 12
Sears Roebuck & Co. v. F. T. C., 258 Fed. 307 (7th Cir. 1919) 19
Shelley v. Kraemer, 334 U. S. 1 16
Sweatt v. Painter, 339 U. S. 629 ..... 8, 16

Thornhill v. Alabama, 310 U. S. 88 .....7, 9, 12

Watson v. City of Memphis, 373 U. S. 526 ..... 8, 16

Yick Wo v. Hopkins, 118 U. S. 356 ..... 8, 16
Young Adults for Progressive Action, Inc. v. B. & B. Cash Grocery Stores, Inc., 151 So. 2d 877 (1963) 15

Statutes Cited

Florida Constitution, Article 12, Sec. 12 14

Florida Statutes, Ann., 1944:
Section 228.09 14
Section 352.03 14
Section 352.04 14
Section 945.08 14
Section 955.12 14

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the District Court of Appeal of Florida, Second District (R. 171-178) is reported at 152 So. 2d 179 (1963).

Jurisdiction

The judgment of the District Court of Appeal of Florida, Second District, was entered on April 7, 1963 (R. 171). Mr. Justice Black extended the time for filing the petition for writ of certiorari to August 14, 1963 (R. 180). The petition was filed on August 12, 1963, and was granted on December 9, 1963. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

Question Presented

Whether petitioners, picketing peacefully in front of the premises of the respondent mart to advise the public that the establishment discriminates against Negroes in respect to service at the lunch counter and the cafeteria and employment throughout the organization, may be enjoined from engaging in this aspect of freedom of expression because they represent a racial minority rather than a labor union, in light of the guarantees of the Fourteenth Amendment to the United States Constitution?

Statement

The respondent in this case, Webb's City, is a corporation which operates a department store and other commercial facilities within the City of St. Petersburg, Florida. As part of its business enterprises, it maintains a lunch counter and cafeteria from which Negroes were excluded, prior to the events which gave rise to this controversy, although Negro customers were welcomed in all other facilities within the Webb's City complex.

Petitioners are the St. Petersburg Branch of the National Association for the Advancement of Colored People and Dr. Ralph M. Wimbish, its president. On December 2, 1960, and for the next four days, pickets from the St. Petersburg Branch of the National Association for the Advancement of Colored People carried placards outside of Webb's City, urging the public not to patronize the store because of its refusal to serve Negroes in the cafeteria (R. 33), and its discrimination in the hiring and upgrading of Negroes as employees (R. 33, 34).

On December 7, 1960, respondent filed its complaint in this cause, requesting a temporary and permanent injunction on the grounds that the acts of petitioners constituted a malicious and unlawful interference with the business of the respondent. The respondent alleged that it had

been and was being irrevocably damaged in that receipts from gross sales on each day of the picketing were approximately $15,000.00 below the reasonably expected revenue, and that it had no adequate remedy at law (R. 1-4). Respondent obtained a temporary restraining order in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, prohibiting petitioners from any further picketing of Webb's City, and from displaying signs requesting that members of the public not trade with respondent (R. 4-5).

On December 23, 1960, petitioner Dr. Ralph M. Wimbish moved to dissolve the temporary restraining order and filed his answer and defenses to this action (R. 12, 13-15). On December 27, 1960, petitioner the National Association for the Advancement of Colored People moved to dismiss the complaint (R. 15-16). On March 10, 1961, petitioner National Association for the Advancement of Colored People entered its answer and defenses to respondent's complaint (R. 54).

On March 8, 1961, hearing on petitioners' motions and trial of the issues was held in the Circuit Court of the Sixth Judicial Circuit in Clearwater, Florida (R. 72-154). The evidence showed that petitioner Dr. Wimbish organized the demonstration after negotiations with the store had failed (R. 120), in order to acquaint the public with the fact that Webb's City discriminated against Negroes in respect to service at its cafeteria (R. 118-119) and in the upgrading and hiring of employees (R. 33-34). The pickets were instructed not to interfere with anyone, to walk close to the edge of the sidewalk so that the public could pass on the street, and to keep 15 feet apart (R. 36, 126, 132, 142).

Mr. J. E. Webb, president of the respondent Webb's City, testified that he observed no violence or personal interference with customers during the picketing (R. 84, 88). This was confirmed by other witnesses (R. 119, 128,

138, 142, 145). Mr. Webb also testified that the pickets had once entered the store, but had left as soon as they were asked to do so by store executives (R. 86). Other witnesses testified that they did not observe the pickets entering the store at any time (R. 119, 123, 128, 137, 142, 145). A police officer testified that there was no violence (R. 107).

There was testimony that an employee emerging from Webb's City with parcels had been told by a picket that there were no cabs available, and had then obtained a ride in the automobile of another employee (R. 110-111); but these facts appear to bear no relevance to the instant controversy. Witnesses also testified that harassing anonymous telephone calls were received by respondent (R. 112); but it was affirmatively shown that petitioners had made no such calls (R. 38, 128, 138, 143, 145).

Evidence was presented that a stranger who began to march with the pickets and momentarily obstructed a doorway had been arrested (R. 71, 101), but it was shown that this man had no connection with the petitioners (R. 123, 124, 128), nor was any legal action taken by petitioners on his behalf (R. 124).

Witnesses indicated that the picketing was at all times peaceful, and that the pickets had followed instructions as to the proper method of informing the public of the discrimination complained of (R. 127, 142, 145, 149).

Respondent then introduced evidence that receipts for one of the days when picketing took place was some $11,660.00 below that of the same day of the preceding year, and that there had been a general loss of revenue since the commencement of the picketing (R. 94, 95). Petitioners showed that receipts for a day preceding the picketing were also below those of the same day the preceding year (R. 95).

On May 3, 1961, the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County

rendered its decision, issuing a permanent injunction restraining petitioners from picketing the premises and from displaying signs on the sidewalk near respondent's business, requesting that the public not trade with respondent (R. 154-160).

On June 28, 1961, petitioners filed their notice of appeal to the Supreme Court of Florida (R. 161), and on July 7, 1961, filed their assignments of error, contending that the injunction appealed from violated the Florida Constitution, Declaration of Rights, Sections 13 and 15, and the First and Fourteenth Amendments to the Constitution of the United States, in that the acts enjoined constituted peaceful picketing and were legally justified and protected by the above constitutional safeguards (R. 163-164). Petitioners also filed on July 7 their directions to the clerk and designation of the record (R. 165-166).

On May 17, 1961, respondent moved to tax costs against petitioners and to release respondent's surety; the motion was granted on July 10, 1961 (R. 162, 167-168). On July 13, 1961, petitioners moved to incorporate judgment for costs into the record on appeal because the judgment for costs was filed subsequent to the expiration of the appeal period; the motion was granted on July 24, 1961 (R. 168).

On May 8, 1962, the appeal was argued in the Supreme Court of Florida. On June 11, 1962, that court ordered the cause transferred to the District Court of Appeal of Florida, Second District, within five days, unless the parties "shall bring to the attention of the Court that the cause is one which should be heard and determined by this Court" (R. 169). On June 16, 1962, the petitioners filed objections to the transfer and a brief in support of the jurisdiction of the Supreme Court of Florida. On September 25, 1962, the Supreme Court of Florida entered an order transferring the cause to the District Court of Appeal of Florida, Second District, on the grounds that the Supreme Court of Florida had no jurisdiction over the cause (R. 170). The

court rejected the argument that the decision below had construed a controlling provision of the Florida and federal Constitutions.

On April 17, 1963, the District Court of Appeal of Florida, Second District, entered its opinion affirming the judgment of the circuit court enjoining petitioners from peaceful picketing of the respondent department store (R. 171-178), on the grounds that the picketing was "coercive" because it injured the business of a commercial enterprise (R. 177); and it held that cases relating to labor disputes were inapplicable (R. 176).

Because of a delay in preparing the record, Mr. Justice Hugo L. Black granted an order extending petitioners' time to file this petition until August 14, 1963 (R. 180).

On November 18, 1963, petitioners filed a reply brief requested by this Court, arguing that the judgment below was a final judgment within the meaning of Title 28, United States Code, Sec. 1257, since there were no grounds for appealing the judgment below to the Supreme Court of Florida other than those already rejected by that court.

After this Court had granted certiorari on December 9, 1963 (R. 181), respondent on January 4, 1964, filed a "Suggestion of Mootness" alleging that the sole issue in this cause was the discrimination in respondent's cafeteria, and that this discrimination had ceased. Petitioners opposed this suggestion in a memorandum filed on January 10, 1964, pointing out that discrimination in respondent's cafeteria was not petitioners' sole complaint, and, moreover, the legality of respondent's practices was not the question being reviewed by this Court. The issue for determination in these proceedings is whether petitioners may constitutionally be enjoined from engaging in peaceful picketing directed at the consumer to enlist public support for a challenge of the practices of a business establishment.

Summary of Argument

Petitioners sought, through the method of peaceful picketing, to enlist public support for their protest against the racial discrimination practiced by the respondent retail establishment, Webb's City, which refused to serve Negroes in its cafeteria and discriminated on the basis of race in hiring and upgrading employees (R. 33, 34). Respondent claimed that it was economically damaged because consumers withheld their patronage following the picketing, and that on this basis the picketers could be enjoined from appealing to consumers through the carrying of placards in the public streets in front of respondent's premises.

This Court has held that peaceful picketing is protected under the First and Fourteenth Amendments as a form of free speech which cannot be stifled through state interference and that "the group in power at any moment may not impose . . . sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Thornhill* v. *Alabama*, 310 U. S. 88, 104.

Petitioners did not engage in violence, such as was proscribed in *Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, nor were they seeking an unlawful objective which would have brought them under the rule of *Giboney* v. *Empire Storage Company*, 366 U. S. 490; *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722; *International Brotherhood of Teamsters, Local 695* v. *Vogt, Inc.*, 354 U. S. 284; and *Hughes* v. *Superior Court*, 339 U. S. 460. The objectives of petitioners—seeking an improvement in the status of Negro citizens—have been upheld by this Court. *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; and *NAACP* v. *Button*, 371 U. S. 415. There is, therefore, no factor in the instant case upon which an injunction against peaceful picketing can be grounded.

The decision below, affirming an injunction issued by the Circuit Court of the Sixth Judicial Circuit for Pinellas County, was not based on a finding that the picketing was enmeshed in violence, nor upon any other valid state ground. Instead the injunction was upheld because the picketing was coercive and on the rationale that since petitioners represented a racial minority rather than a labor union, the labor cases were inapposite (R. 176). Thus, the decision is supportive of the use of state power to maintain a state policy of segregation and discrimination. It is clear that the 14th Amendment proscribes state authority directed towards the enforcement of racial and color differentiations. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education*, 347 U. S. 483; *Goss* v. *Board of Education*, 373 U. S. 683; *Watson* v. *City of Memphis*, 373 U. S. 526; *Gayle* v. *Browder*, 352 U. S. 903. The decision is, therefore, in conflict with the constitutional doctrine barring racial discrimination, as well as that protecting the right of freedom of expression.

Respondent seeks to prevent this Court from reviewing the decision below by alleging that because it has integrated its cafeteria, all the issues are resolved and the cause is moot. However, the record demonstrates that petitioners picketed to protest various policies of respondent, including his refusal to hire and upgrade employees on the basis of merit, rather than race (R. 33, 34). Moreover, the issue before this Court is not whether respondent's views and policies are legal, but whether petitioners have the constitutional right to advise the public of their views through peaceful picketing.

Since Negroes and groups concerned with Negro betterment do not own newspapers, television or radio stations, or other means of mass communication, it is essential that they be permitted to reach the public at large by being protected in their right to engage in peaceful picketing and to disseminate their ideas through the carry-

ing of signs as to the evil and hurt of discrimination. Without such a right, this Court's holdings in *NAACP* v. *Alabama, supra* and *NAACP* v. *Button, supra,* that minorities may act in concert to advocate lawful ends cannot be made wholly effective, and an avenue for securing public acceptance of the principle of equality of opportunity and treatment will be closed off.

ARGUMENT

I. Picketing which is lawful in manner and purpose is protected by the First and Fourteenth Amendments of the United States Constitution.

The decisions of this Court have established that peaceful picketing, like the distribution of pamphlets and other printed matter, is a form of free speech which is entitled to the constitutional protection of the First and Fourteenth Amendments. As was said in *Carlson* v. *California,* 310 U. S. 106, 112:

> The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern . . . . For the reasons set forth in our opinion in *Thornhill* v. *Alabama,* supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State.

This constitutional safeguard cannot be lost merely because the groups or individuals picketing enlist the support of others so that public pressure might be brought to bear upon the person being picketed to change his course of conduct. Cf. *Ex Parte Lyons,* 81 P. 2d 190 (1938); *Rosman* v. *United Strictly Kosher Butchers,* 298 N. Y. S. 343 (1937). Analysis will show that such influences

are an ingredient of all picketing. The fact, therefore, that the public was persuaded to side with the picketers cannot form the basis for a judicial determination of the legality or illegality of this means of expression. Decision rests on whether mere persuasion or more coercive means are employed to gain public support.

The concept that picketing may in some instances be coercive was first introduced in the decisions of this Court in the concurring opinion of Mr. Justice Douglas in *Bakery Drivers* v. *Wohl*, 315 U. S. 769, 776, which pointed out that picketing and speech, while related, were not synonymous.

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since it may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

However, there is no legal or factual element in the instant case which would place it within the ambit of this Court's holdings which have found some aspect of picketing to be coercive and therefore outside the protective shelter of the constitutional guarantees of freedom of speech. Petitioners made their appeal solely through persuasion. There was no violence involved (R. 84, 88, 107), such as was condemned in *Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287. Nor was fear of union discipline a factor, as it was in *Giboney* v. *Empire Storage Company*, 366 U. S. 490, 498, where Empire was damaged because of the ". . . formation of a picket line warning union men not to cross at peril of their union membership." See also *Carpenters and Joiners Union* v. *Ritters Cafe*, 315 U. S. 722, 723; *Local Union No. 10, Plumbers & Steamfitters* v. *Graham*, 345 U. S. 193, 195; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470, 472; *International Brotherhood of Teamsters, Local 695* v. *Vogt, Inc.*, 354 U. S. 284, 286; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 697.

Nor can it be argued that petitioners' conduct was not constitutionally privileged because their goals were in violation of a valid state law and in pursuit of an unlawful objective, such as a secondary boycott. See *Carpenters and Joinders Union* v. *Ritter's Cafe, supra.* See also *Local Union No. 10, Plumbers & Steamfitters* v. *Graham, supra; Building Service Employees* v. *Gazzam*, 339 U. S. 532; *International Brotherhood of Teamsters, Local 695* v. *Vogt, Inc., supra;* and *Giboney* v. *Empire Storage Co., supra.* On the contrary, the lawfulness of petitioners' objective—equality of treatment for all Negro citizens—was reaffirmed most recently in *NAACP* v. *Button*, 371 U. S. 415, 429.

Petitioners were protesting discrimination in hiring (R. 33-34) but were not seeking the establishment of a racial quota. Thus, the holding in *Hughes* v. *Superior Court*, 339 U. S. 460, is not pertinent. In *Hughes*, picketing to induce an employer to hire a certain percentage of Negro employees was held to be unlawful, on the grounds that state law prohibited a quota system as in essence a discrimination based on race.[1] However, this Court said at page 466: "The California Supreme Court suggested a distinction between picketing to promote discrimination, as here, and picketing against discrimination." The Calfornia court assumed without deciding that, "if such discrimination exists, picketing to protest it would not be for an unlawful objective." *Hughes* v. *Superior Court*, 98 P. 2d 885, 888 (1948).

In short, we have in the instant case nothing beyond the "mere influence exerted by the fact of picketing" as sanctioned in *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293. Some members of the public may have decided to withhold their patronage as a result of agreement with petitioners' position. Respondent seeks to enjoin the

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[1] Cf. *Green* v. *Samuelson*, 168 Md. 421 (1935) and *A. S. Beck Shoe Corp.* v. *Johnson*, 274 N. Y. S. 946 (1934).

picketing on this basis. However, as this Court said in *Thornhill* v. *Alabama*, 310 U. S. 88, at page 104:

> It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose . . . sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

This doctrine, it is respectfully submitted, still retains all of its vitality.

Respondent also seeks to support the injunction on the grounds that petitioners could have used other means to communicate their views to the public. This argument was rejected in *Schneider* v. *State*, 308 U. S. 147, 163:

> [The] streets are natural and proper places for dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

See also *Hague* v. *CIO*, 307 U. S. 496, 516.

Moreover, Negroes do not own any major newspapers or television and radio stations in St. Petersburg, Florida, which reach the public as a whole; nor are funds for advertising usually available to enable them to convey their views to the public concerning various aspects of racial discrimination and race relations in the community. Even where funds are made available, the use of paid advertisements as communication media may not be possible. Compare *Kennedy* v. *Retail Clerks Union, Local 324*, 194 F. Supp. 131, 135 (S. D. Cal. 1961), where the Retail Clerks Union

attempted to place an advertisement in five Los Angeles metropolitan newspapers, but only two of the newspapers would accept it. In any event, the injunction on review here gains no sustenance from the fact that indirect or more expensive means of expression were available than those employed.

Indeed, in many instances, the carrying of signs relating the policies of a merchant on racial discrimination may be the sole avenue of appeal to the public. Such an appeal reaches not only a narrow segment of the Negro community but the white community as well. It may be that a placard with the words "BUY WITH FRIENDS: MERCHANTS WHO TREAT YOU WITH HUMAN DIGNITY" (R. 68) could cause a spectator who has not considered the problem—and who, under Florida's system of segregation, has severely limited opportunities to exchange views with Negroes—to examine the rightfulness of discrimination in the context of a democratic society founded on the worth of the individual.

The opportunity to persuade is of paramount importance in a democratic society, for it keeps divergent views before the people. It is a basic postulate of our society that if dissemination of ideas is unhampered, American citizens will be better informed and more likely to reject what is false. In a complex modern society such as ours, public persuasion is more likely to be effected through group action. For that reason this Court has been particularly concerned with protecting the constitutional right of unpopular minorities to band together to act in concert in the pursuit of lawful ends. *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. The protection accorded orderly group activities in those cases, like the guarantee of freedom of speech for the individual, is the indispensable ingredient of an open society.

This Court in *NAACP* v. *Button*, *supra*, pointed out that a politically weak minority, unable to improve its

status through executive or legislative action, often resorts to litigation to vindicate its fundamental rights. In a society based on the rule of law, testing ideas in the courts is a valuable aid to the achievement of equal citizenship. Similar succor is afforded when minority views, broadcast to the public by peaceful picketing, are thereby given the opportunity to gain wider understanding and acceptance. This too "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society." *NAACP* v. *Button*, *supra*, at page 431.

II. The decision below is in conflict with the holdings of this Court, since it seeks to restrain public protests against racial discrimination because of a state policy of segregation.

Respondent's president and the police officer, on the scene during the picketing, testified that there was no violence (R. 88, 107). The pickets marched 15 feet apart and did not interfere with respondent's customers in any way (R. 84). A stranger who began to march with the picketers and momentarily obstructed a doorway was arrested, but this was shown to have no relation to the petitioners' activities (R. 123, 124, 128). It was also shown that petitioners had no connection with anonymous telephone calls received by respondent (R. 38, 128, 138, 143, 145). The picketing was at all times peaceful. Nevertheless, the Florida courts held that the picketing was subject to prohibition.

The decision below, petitioners respectfully submit, is implicitly founded upon Florida's racial policy [2] and repre-

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[2] See Fla. Statutes, Ann., 1944:
Section 955.12 (segregation at industrial school for boys)
Secs. 352.03 and 352.04 (segregation on railroads)
Sec. 945.08 (as amended, 1957) (segregation of prisoners)
Sec. 228.09 and Fla. Constitution, Article 12, Sec. 12 (segregation in schools).

sents an attempt to suppress peaceful protest against racial discrimination in violation of the equal protection clause of the Fourteenth Amendment. Under Florida law picketing by labor unions is permitted, but a different and adverse rule governs picketing by Negro groups (R. 171). The effect of such a holding is to cut off lawful group advocacy of racial equality and attempts to enlist support of a challenge to the validity of racial discrimination.

This judgment below is reinforced by a recent decision of the District Court of Appeal of Florida, Second District, *Young Adults for Progressive Action, Inc.* v. *B. & B. Cash Grocery Stores, Inc.*, 151 So. 2d 877 (1963). The court held at page 878 that although the picketing with the intention of advising the public that a store discriminated in hiring and upgrading of Negroes was concededly peaceful, the pickets did not "represent the interest of labor" and had no constitutional protection because picketing "is more than 'free speech' and must be dealt with accordingly."

And on December 19, 1963, Marion County Prosecuting Attorney, E. G. Musleh, filed a Petition for Injunction in the Juvenile Court in Marion County on behalf of himself and as attorney for Sheriff Doug Wiliis of Marion County, asking for an injunction "prohibiting *minority groups* from picketing or demonstrating in Marion County, Florida . . ." [emphasis added]. On December 20, 1963, in response to this petition, Lewis O. Meyers, Jr., County Judge of the Juvenile Court in and for Marion County, Florida, issued an order that no person under the age of seventeen within the county may picket in front of or near local business establishments without prior permission from the Juvenile Court.[3]

This Court has consistently ruled that no state may enforce regulations based explicitly or implicitly upon a racial

[3] Unpublished.

criterion. See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Goss* v. *Board of Education*, 373 U. S. 683; *Watson* v. *City of Memphis*, 373 U. S. 526. This is true whether such regulations are propounded through its legislature or its judiciary. *Shelley* v. *Kraemer*, 334 U. S. 1, 14. See also *Ex parte Virginia*, 100 U. S. 339, 347. Certainly, the state cannot argue that its segregation laws suffice to establish a subordinating interest, rendering permissible incursions on the petitioners' rights to freedom of association and freedom of speech. *NAACP* v. *Alabama*, *supra*.

Petitioners' right to picket in the public streets is indisputable, in the light of this Court's decisions in *Lombard* v. *Louisiana*, 373 U. S. 267 and *Peterson, et al.* v. *City of Greenville*, 373 U. S. 244, which held that where a state encouraged and enforced segregation, peaceful demonstration—even on the premises of a discriminatory merchant—cannot be stifled by the state. However, without a declaration of their right to picket in order to eliminate discrimination, petitioners and similar organizations will be forced continuously to seek protection from the federal courts. For example, the defendants were compelled to go to the Federal District Court to seek the dissolution of the unconstitutional state court order of Judge Myers of the Juvenile Court of Marion County, *supra*; a preliminary injunction against the enforcement of the order has been granted by the District Court. *Florence, et al.* v. *Lewis O. Meyers, Jr., et al.*, — F. Supp. — [U. S. District Court for the Middle District of Florida, Ocala Division, No. 64-3-Civil-Ocala, Jan. 22, 1964].

In the instant case, petitioners have been under the unlawful effect of the injunction for more than three years.

Negroes in the State of Florida will continue to be harassed by such restraints in their efforts to make public their grievances, until the decision below is reversed on the merits and constitutional protection is accorded the right to peaceful picketing in an effort to achieve equality of opportunity and treatment for all persons, without invidious differentiations based upon race.

III. Respondent's suggestion of mootness has no basis in law or fact.

Respondent alleges that its cafeteria is now integrated and that this is the sole issue before this Court, and suggests that the case is therefore moot. This contention stems from a misreading of the applicable law and the record in this case.

The record conclusively shows that petitioners were protesting discrimination in the hiring and upgrading of employees as well as respondents' refusal to serve Negroes in the cafeteria. Petitioner Dr. Ralph Wimbish leaves no doubt on that score (R. 33-34):

> A. I am of the opinion that the body was of the opinion also that not only was there discrimination as far as use of a particular facility was concerned, a food service, but there was also discrimination in the employment area in that there are certain jobs available to citizens of this state and country at Webb's City who are white that are not available to [N]egroes. And I refer specifically to such jobs as clerks and certain other positions considered to be white collar that [N]egroes are not eligible for on the basis of race and race alone.
>
> Q. Then, as I understand your testimony, that in addition to your objection to the manner in which Webb's City operated its cafeteria and lunch counter,

> that you also objected—that your organization also objected to the fact that members of your race can't hold any job in the store, is that right? A. That is right.
>
> Q. Would it be fair to say then that in your opinion the management, and specifically the individual known as Doc Webb, whose initials are J. E.—I think they are J. E., I am not sure. What are Doc's initials? A. I think that is right, J. E., yes.
>
> Q. Doesn't have the discretion or the ability to choose the personnel that he wants to work in various departments of [fol. 55] his store, is that—A. No sir, that is not correct. I don't profess that he does not have the discretion nor the ability to select, but I personally charge that he would deny persons that are [N]egroes who have the same qualifications as a white person for any given job. He would deny the [N]egro the privilege of holding that job for the reason that he is a [N]egro.

The pickets carried a sign with the legend "DON'T BUY WHERE YOU CANNOT WORK ON ANY JOB OR BE UPGRADED TO BETTER PAYING POSITIONS" (R. 156). The right to protest these employment practices is very much in controversy here.

The maintenance of cafeteria facilities for whites only was another grievance about which petitioners wished to make a public protest. Respondent claims to have integrated its lunch counter in early 1962 and its cafeteria in the summer of 1963. Yet, it fought with considerable resourcefulness and energy to maintain the injunction in effect preventing picketing to protest any of its policies, and to dissuade this Court from granting the writ of certiorari in this cause. It was only after certiorari was granted that respondent announced that its cafeteria was integrated and suggested that the cause had, therefore, become moot.

Where the party enjoined has allegedly reformed and thereby removed the source of complaint, the cause is not rendered moot because the other party is not bound to accept and rely upon his adversary's assurances of continued good conduct. As this Court said in *Gray* v. *Sanders*, 372 U. S. 368, 376: "... the voluntary abandonment of a practice does not relieve a Court of adjudicating its legality, particularly where the practice is deeply rooted and long standing." See also *John T. Lloyd Laboratories, Inc.* v. *Lloyd Bros. Pharmacy, Inc.*, 131 F. 2d 703, 706 (6th Cir. 1942); *Saxlehner* v. *Eisner, et al.*, 147 Fed. 189 (2d Cir. 1906); *Consumers Union of United States, Inc.* v. *Lectra Sales Corp., et al.*, 179 F. Supp. 161, 162 (S. D. N. Y. 1959); *Consumers Union of United States, Inc.* v. *Admiral Corp.*, 186 F. Supp. 800, 801 (S. D. N. Y. 1960); *Juvenile Shoe Co. Inc.* v. *Federal Trade Commission*, 289 Fed. 57, 59-60 (9th Cir. 1923). Certainly, the rationale of these cases applies here, where the person seeking the injunction gives assurances of changed policies to block a determination of the validity of petitioners' claimed right under the 14th Amendment to picket its establishment free of state restraint. Petitioners should not be required to accept or rely upon respondent's statements of a change of heart so as to render the cause moot. This is particularly true where the party claiming to have reformed continues to question the validity of his opponent's legal position, for this is an indication that the practices in dispute might again be reinstituted. *Sears Roebuck & Co.* v. *F.T.C.*, 258 Fed. 307, 310 (7th Cir. 1919).

Moreover, there can be even less question of mootness in the instant case than in *Gray* v. *Sanders*, *supra*, since the changed policies involved are not even the subject of the suit. The legality of respondent's racial discrimination is not at issue. What is before this Court is the legality of petitioner's picketing to enlist public support for their views, and the constitutionality of respondent's attempts

to ban such picketing. Respondent cannot, after injuring petitioners, merely withdraw its suit to avoid court review; the intent of Rule 41 of the Federal Rules of Civil Procedure was clearly to prevent such a possibility. Cf. *In re Barnett*, 124 F. 2d 1005 (2 Cir. 1942).

It is respectfully submitted that since the controversy between the parties still exists and the federal issues remain of primary operative importance, the case should be decided on its merits by this Court.

CONCLUSION

Wherefore, it is respectfully submitted that the decision below, since it conflicts with both the constitutional doctrine barring racial discrimination and that upholding freedom of expression, should be reversed on the merits and that the injunction against petitioners should be vacated.

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